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Supreme Court, U.S.
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No. 90-___

In The

Supreme Court of the United States

October Term, 1990

STEPHEN IVY AND CHARLENE IVY,

Petitioners,

v.

ROBERT W. MYERS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Free Exercise Clause of the First Amendment to the United States Constitution prohibit a Bankruptcy Court from refusing to confirm a Chapter 13 Plan because the debtor's Chapter 13 budget contains a deduction for a monthly tithe mandated by the debtor's sincerely held religious beliefs?

2. Is a tithe, motivated by a debtor's sincerely held religious beliefs, permitted as a "reasonably necessary" expense in a debtor's Chapter 13 budget?

3. Did the Bankruptcy Court lack jurisdiction to deny confirmation pursuant to 11 USC Section 1325(b)(1) of debtors' Chapter 13 Plan where no interested party filed an "objection" to confirmation as defined by Bankruptcy Rule 3020?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Stephen Ivy and Charlene Ivy ("Ivys"), respectfully pray that this Court issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, filed December 10, 1990.

OPINIONS BELOW

The unpublished memorandum decision of the Court of Appeals for the Ninth Circuit is reprinted at Appendix A. The unpublished opinion of the United States District Court for the District of Oregon (Frye, J.) is reprinted at Appendix B. The unpublished supplemental opinion of the United States Bankruptcy Court for the District of Oregon (Hess, J.) is reprinted at Appendix C. A partial transcript of the adjourned confirmation hearing containing the oral ruling of the United States Bankruptcy Court for the District of Oregon (Hess. J.) is reprinted at Appendix D.

JURISDICTION

The Court of Appeals' order affirming the District Court was filed on December 10, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This petition for writ of certiorari is filed within the 90 day period prescribed by 28 U.S.C. 2101(c) as computed in accordance with Rule 13.4 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

Other relevant statutes and rules are reprinted at Appendix E:

11 U.S.C. Section 1322(c)
11 U.S.C. Section 1325
11 U.S.C. Section 1329(a)
Bankruptcy Rule 3020(b)
Bankruptcy Rule 9009

STATEMENT OF THE CASE

This matter came before the bankruptcy court on the Ivys' motion for confirmation of their Chapter 13 plan ("Plan"). The Plan was a thirty-six month plan and would have paid their unsecured creditors a dividend of approximately twenty-seven percent. No interested party filed objections to confirmation of the Plan. The Chapter 13 trustee orally expressed concern for one item in the Chapter 13 budget which was a deduction of $365 per month for a tithe to the Ivys' church. The bankruptcy court denied confirmation of the Plan on the basis that the Plan was not proposed in "good faith" so long as the Ivys insisted on including a tithe in their Chapter 13 budget. The bankruptcy judge said that he would permit the Ivys to extend the Plan beyond the three-year limit set by 11 U.S.C. Section 1322(c) if the Ivys would agree to

continue making monthly payments until an amount equal to their tithes had been made up. The bankruptcy judge estimated that his proposal would require the Ivys to pay eighteen additional monthly plan payments of $745 each. In his written "Supplemental Opinion", the bankruptcy judge reasoned that the effect of allowing a tithe would be "to permit the debtor to require that his creditors contribute to his chosen charity." App. C at App. 9 (quoting *In re Curry*, 77 Bankr. 969, 970 (Bankr. S.D. Fla. 1987)).

On review, the United States District Court for the District of Oregon affirmed the bankruptcy court. Subsequent to filing the Ivys' appeal to the court of appeals for the Ninth Circuit, the bankruptcy judge requested, and the Ivys agreed, to make the scheduled proposed plan payments to the Chapter 13 trustee as a condition to continuing to receive the protection of the automatic stay of 11 U.S.C. Section 362. The Ivys have made all thirty-six scheduled monthly plan payments called for under the Plan. However, the case is not moot because the issue remains whether the Ivys must make an additional eighteen payments to obtain confirmation of the Plan.

The court of appeals ruled that it was "not necessary . . . to determine . . . whether denial of the plan amounted to an unconstitutional infringement on the Ivys' freedom to practice their religion." App. A at App. 3. The court of appeals held that the extension suggested by the bankruptcy court would have accommodated the Ivys' sincerely held religious beliefs. The court said the Ivys were trying to accommodate their religious beliefs at the expense of their creditors.

The evidence at the confirmation hearing established that the Ivys' belief in tithing was sincerely held and actually practiced preceding the filing of their petition for relief. All courts below accepted the sincerity of the Ivys' beliefs when rendering their decisions.

REASONS TO ALLOW THE WRIT

I. The Decision Below is in Direct Conflict with Recent First Amendment Decisions of this Court.

The bankruptcy court's refusal to confirm the Ivys' Plan forces them to choose between following the precepts of their religion or forfeiting the right to confirmation of their Chapter 13 plan. In *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), the state of Florida sought to deny unemployment compensation to Paula Hobbie who refused to work on Saturdays, the Sabbath under her religion, and lost her job as a result. The state claimed that her job was available to her but that she was discharged for misconduct for choosing not to work on Saturdays. Because she was discharged, the state claimed she was not eligible for unemployment compensation. This Court held that:

> "[W]here [the state] denies [an important] benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."

Id. at 141 (quoting *Thomas v. Review Bd., Employment Security Div.*, 450 U.S. 707, 717-718 (1981) (emphasis omitted)).

A free exercise inquiry properly "asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling government interest justifies the burden." *Jimmy Swaggert Ministries v. Board of Equalization*, 110 S. Ct. 688, 693 (1990) (quoting *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2148 (1989)). This "is to ensure that incentives to practice a religion are not adversely affected by government action." McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1146 (1990).

The continued vitality of *Hobbie* was reaffirmed in this Court's recent ruling in *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595, 1598 (1990). In that case, this Court held that the State of Oregon could deny unemployment compensation consistent with the free exercise clause for work related criminal misconduct which was religiously motivated. The misconduct was the sacramental use of peyote. The Oregon Supreme Court had previously held that the sacramental use of peyote violated Oregon's controlled substance law. *Smith*, 110 S. Ct. at 1598 (citing *Smith v. Employment Div. Dep't of Human Resources*, 307 Or. 68, 72-73 (1988)). The critical distinction between *Smith* and the other unemployment cases[1] was that "the conduct at

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[1] The unemployment cases are: *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment*

(Continued on following page)

issue in those cases was not prohibited by law." *Smith*, 110 S. Ct. at 1598. This Court further stated that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 1600.

There is no law prohibiting a religious adherent from tithing to the church of his choice. If Congress were to enact such a law it clearly would be unconstitutional. Because tithing itself may not be constitutionally regulated or prohibited, it follows that the federal government may not deny or condition obtaining relief under Chapter 13 upon a person's refusal to cease tithing, absent at least a showing of a compelling state interest.

The burden on the free exercise of religion is not avoided by the bankruptcy judge's proposal to extend the plan for eighteen months. The proposed extension would require the Ivys to pay more, and to be under the jurisdiction of the bankruptcy court longer, than a non-tithing debtor in the same circumstances, thereby placing a substantial burden on the Debtors' right to freely exercise their religion. An analogous situation existed in *Hobbie*, where the Appeals Commission contended that Paula Hobbie faced "only a limited disqualification from receipt of benefits, and that once this fixed term has been served, 'she [would] again be on an equal footing with all other

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Appeals Comm'n, 480 U.S. 136 (1987); *Thomas v. Review Bd., Employment Sec.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). The *Smith* opinion omitted *Frazee* from its discussion.

workers.' " 480 U.S. at 142-143 (citation and footnote omitted). The Appeals Commission argued that such a limited disqualification provision was "less coercive" than the complete disqualification invalidated in *Sherbert v. Verner*, 374 U.S. 398 (1963), and "the burden it impose[d] on free exercise [was] therefore permissible." *Hobbie*, 480 U.S. at 143. This Court held "[t]his distinction is without substance" and "the disqualification penalty is substantial." *Id.* Just as the limited disqualification from unemployment benefits was held to be an unconstitutional infringement on the free exercise of religion, so too would be the bankruptcy court's attempt to coerce the Debtors to extend their plan.

The court of appeals did not believe the Ivys were unfairly burdened if the Ivys were required to remain in Chapter 13 for an additional eighteen months as the price of continuing to practice their religious beliefs. Each of the lower courts apparently concluded that the Ivys would achieve their stated goal (a discharge under Chapter 13), even though it might take eighteen months longer. It was once thought acceptable in some parts of our country to tell a black person to ride in the rear of the bus on the presumption he would still get to his intended destination at the same time as the other passengers. This Court does not tolerate second class citizenship based on a person's race and it should not tolerate a second class citizenship in our bankruptcy courts based on a person's religion.

The bankruptcy judge said that permitting a debtor to tithe during the performance of his Chapter 13 plan is tantamount to requiring a debtor's creditors to contribute

to the debtor's church. Petitioners find it hard to accept such a view for two reasons.

1. In order to achieve confirmation of any Chapter 13 plan, the Bankruptcy Code requires that the plan must pay as much or more to the creditors than they would receive if the debtor were to file a case under Chapter 7. 11 U.S.C. Section 1325(a)(4). Because of this requirement, there is no possibility that the creditors in a Chapter 13 are subsidizing the debtors' religion. They must receive as much or more than they would get if the debtor filed a petition under Chapter 7. In the Ivys' case, the creditors stood to receive approximately twice as much under the Plan as the creditors would have received if the Ivys had filed a petition under Chapter 7.

2. In other areas of law, religious activities which clearly cost non-believers additional money are accommodated. The most notable example is that contributions to religious organizations are tax deductible. I.R.C. Section 170(c)(2)(B). In 1987, the year the Ivys filed their petition for relief, the amount for charitable and religious contributions itemized on income tax returns filed with the Internal Revenue Service totalled in excess of $49.6 billion. Internal Revenue Service, *Statistics of Income – 1987 Individual Income Tax Returns* 50 (1990). The lost revenue must be made up by the other taxpayers. Similarly, real property owned by religious organizations is widely exempted from real property taxes, again forcing secular taxpayers to subsidize the exemption. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). Although the universe among which the burden is spread is larger than the universe in a Chapter 13 case, the principle is the same. The Ivys find it a difficult proposition of constitutional

law that permits tax deductions for religious contributions under the Internal Revenue Code, and permits exemptions from real property taxes for property owned by religious organizations, but prohibits tithes under the Bankruptcy Code.

II. The Decision Below Opens the Door for Substantial Abuse of the First Amendment Rights of Thousands of Future Petitioners in Bankruptcy.

The decision of the court of appeals below is fraught with First Amendment inconsistencies and has the potential for countless future First Amendment abuse. Consider all of the following scenarios which are presented as examples of the illogical and constitutionally impermissible results which would flow naturally from the decision below if it is not overturned by this Court:

A. Assume that the plaintiff in *Hobbie* was a debtor performing under a Chapter 13 plan when she informed her employer that because of her conversion to the Seventh Day Adventist Church, she would no longer be able to work on her Sabbath, from sundown on Friday to sundown on Saturday. In a five-day work week, this could result in a direct reduction of twenty percent of Hobbie's income. Assume that her employer did not fire her but was willing to permit her to continue working on a four day week and that the monthly payments under the hypothetical Chapter 13 plan were precisely twenty percent of income. Under 11 U.S.C. Section 1329(a), a debtor may amend his plan after confirmation in response to changes in the debtor's economic circumstances. Where there is a reduction in income, a debtor is

routinely permitted to reduce his plan payments accordingly. In this example, Hobbie would seek to amend the plan to reduce her payments to reflect her twenty percent reduction in disposable income. Could a bankruptcy court refuse to amend a Chapter 13 plan to reflect the reduction in disposable income, or would a court hold that the amendment was proposed in bad faith since income from Saturday employment is available to the debtor, but she refuses to work for religious reasons, thus preferring her beliefs over her creditors? Is a religious adherent's refusal to work on his sabbath, which results in the reduction of disposable income for creditors in a Chapter 13 plan any different than working a full five days a week, yet making a ten percent tithe? In either case, the creditors receive less. Creditors would receive significantly more from a debtor who works five days a week and tithes than they would from the debtor who only works four days a week (assuming that a four-day work week results in a twenty percent reduction in disposable income from a five-day week).

B. Establishing a rule that tithing during a Chapter 13 plan is impermissible "per se" unfairly burdens a debtor's religion by prohibiting a debtor from voluntarily foregoing secular expenses, such as recreation, alcohol, vehicles or a reserve for contingencies, which the bankruptcy courts routinely allow, in favor of a tithe to a church of a debtor's choice. The tithe is more important to that debtor than the secular expenses. Under the decisions below, no matter how many secular expenses a debtor was willing to forgo, he would still not be permitted to tithe without extending his plan and making extra payments.

Pursuant to 11 U.S.C. Section 1325(b) it is a court's duty to consider the listed expenses individually and as a whole to determine whether the debtors' plan meets the disposable income test. *In re Jones*, 65 Bankr. 462, 466 (Bankr. D. Minn. 1985) There was no finding that the Ivys' budget, taken as a whole, was not reasonably necessary for the maintenance and support of the Ivys or dependents of the Ivys. Focusing solely on the Ivys' tithe was an improper approach. A court should examine the other listed expenses in the budget using the same reasonable and necessary standard. *In re Sutliff*, 79 Bankr. 151, 159 (Bankr. N.D.N.Y. 1987)

In this case, the Ivys allocated approximately one percent of their net income ($50 monthly) to recreation. If instead the Ivys had allocated four percent to recreation, and had included a two percent reserve for a contingency factor, both of which are reasonable and routinely allowed, there would have been no increase in the monthly plan payments to creditors even if the Ivys had discontinued their tithe, when the loss of the tax deduction for the tithe is taken into account. Honest debtors, such as the Ivys, should not be punished merely for ordering their priorities in favor of a tithe versus other permissible expenditures and disclosing that fact on the face of their budget, instead of taking full advantage of otherwise allowable deductions in their budget, and then subsequently applying the available money to a tithe instead of to the budgeted expenditures.

A reasonable allowance for "recreation" is universely permitted in the Chapter 13 budget. Recreation is defined in *Webster's Ninth New Collegiate Dictionary* 985 (1984), as:

" . . . to create anew, restore, refresh; . . . refreshment of strength and spirits after work."

For a religious adherent, the participation in the fundamental tenets of his religion, including his duty to tithe, results in a "refreshment of strength and spirits after work". Is recreation permissible so long as it is not religious recreation? For the Ivys, as is true for many religious adherents, their religion is their recreation. What if the Ivys had listed their tithe not in the category on the official form of the Chapter 13 budget for "Religious and Other Charitable Contributions", but rather in the category for "Recreation", with the additional explanation "church activities"? If the Ivys' church sponsors a roller skating party for which there is no admission charge, but donations are "requested", are the Ivys prohibited from making the "donation" because they are in Chapter 13? Clearly the participants are expected to "donate". Such events are dependent upon the "donations" of those who attend. Likewise, there is no "admission charge" to attend church, but "donations" are clearly requested and churches could not survive if those attending did not make contributions. See *In re Moses*, 59 Bankr. 815 (Bankr. N.D. Ga. 1986).

If the court has the power to order a religious adherent to make up payments for his tithes, but does not order a secular debtor to make up for expenses such as recreation, including movies, dances or alcohol consumption, the court has preferred secular expenses over the religious expenses, thereby impermissibly burdening the religious adherent. If it is not "bad faith" to make creditors "pay" for a debtor's recreation then it is also not

"bad faith" to make creditors "pay" for the debtor's religion.

C. The Ivys' Chapter 13 budget reveals that Mrs. Ivy does not work and therefore has no income. Assume arguendo that the only reason she does not work is because her religious beliefs dictate that she should stay at home to raise the Ivys' child. She is well educated and employment is readily available to her. Could the bankruptcy judge compel the Ivys to extend their plan to pay the same amount to creditors that would have been available if Mrs. Ivy was working instead of staying home to raise her child? The rationale is the same. Why should the Ivys be permitted to pay less than a dual wage-earner family in the same circumstances if Mrs. Ivy would otherwise work except for her religious beliefs?

D. Could not a bankruptcy court, when faced with a petition by a childless couple, instruct them that the court will not tolerate the birth nor adoption of any children during the performance of the plan, since the debtors would be more prudent to wait until they could better afford the cost of children? Could the court inform them that if they have children, the court would expect them to make up for the expenses associated with the children by extending their payments beyond thirty-six months?

E. Because the Bankruptcy Code prohibits payments longer than a five-year period (11 U.S.C. Section 1322(c)), there will be cases where the plan cannot be extended long enough to make up for the tithes. A constitutional rule of law must be uniform. *Gallagher v. Evans*, 536 F.2d 899, 902 (10th Cir. 1976). The bankruptcy judge's suggestion should not be adopted because it will lead to

uneven results. What would the rule be if the initial plan proposed was already a 5 year plan and therefore could not be extended? A tithe is either a permitted deduction, or it isn't. If a tithe is permitted, a debtor should not be compelled to make up for the deduction by extending the length of a plan.

The decision below ignores a central feature of the Bankruptcy Code, which is to permit an "honest but unfortunate debtor" to achieve a "fresh start". *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991). The "fresh start" concept not only permits a debtor to begin his life anew, free of a crushing debt burden, but also requires that the bankruptcy court permit him to keep certain basic essential possessions, which are declared exempt, so that a debtor can maintain his personal dignity. In discussing the purpose for bankruptcy exemptions, the Eighth Circuit has stated that "bankruptcy courts must keep in mind the social policies which generate exemptions" one of which is " '[t]o protect the dignity and the cultural and religious identity of the debtor. . . . ' " *Panuska v. Johnson* (*In re Johnson*), 880 F.2d 78, 82 (8th Cir. 1989) (quoting *Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988)). This same social policy of preserving the debtor's dignity and religious identity should be likewise applicable in analyzing the reasonableness of a debtor's proposed expenses in a Chapter 13 budget.

III. The Decisions of the Lower Courts are in Conflict.

Except for the court of appeals below, no circuit court has addressed (in a reported decision) whether religious contributions are permissible expenses in a Chapter 13

budget. The traditional basis for granting certiorari to resolve a conflict among the circuits therefore does not exist here. However, the lack of decisions at the circuit level is not due to the unimportance of the issue, but rather to the financial inability of the class of persons adversely affected to prosecute an appeal.

Four cases hold that a religious contribution is a "reasonable and necessary" expenditure. See *In re Bien*, 95 Bankr. 281 (Bankr. D. Conn. 1989); *In re Wood*, 92 Bankr. 264 (Bankr. S.D. Ohio 1988); *In re Navarro*, 83 Bankr. 348 (Bankr. E.D. Pa. 1988); and *In re Davis*, 68 Bankr. 205 (Bankr. S.D. Ohio 1986).

Five decisions apparently hold that religious contributions are not per se impermissible, but found that the specific religious contributions proposed were not reasonable and necessary under the facts and circumstances presented in the particular case. See *In re Reynolds*, 83 Bankr. 684, 685 (Bankr. W.D. Mo. 1988) ("This Court may not and must not say what if any portion of debtor's income shall go to support his personal religious beliefs, but this Court may determine what constitutes those items reasonably necessary 'to be expended – (A) for the maintenance or support of a debtor or a dependent'." "This court chooses to establish no hard and fast rule as to what amount or percentage of charitable contribution it will construe as 'reasonably necessary'.") (citation omitted)); *In re Chrzanowski*, 70 Bankr. 447, 450 (Bankr. D. Del. 1987) (refusing to confirm debtor's plan which contained substantial religious and charitable contributions where the debtor also continued to accumulate savings through a thrift plan, an IRA, drove a new car, maintained a membership in a country club and retained

additional funds for recreation); *In re Sturgeon*, 51 Bankr. 82, 84 (Bankr. S.D. Ind. 1985) (religious contribution was not reasonably necessary); *In re Breckenridge*, 12 Bankr. 159, 160 (Bankr. S.D. Ohio 1980) ("Church tithes, per se, are certainly not held in disfavor by this Court."); *In re Cadogan*, 4 Bankr. 598, 600 (Bankr. W.D. La. 1980) (debtor was advised by the court that in view of the small payout to unsecured creditors that if "she wished to continue making this contribution [her tithe], other expenditures would have to be reduced").

Three decisions apparently hold that religious or charitable contributions are per se unreasonable and never permitted. See *In re Tucker*, 102 Bankr. 219, 220 (Bankr. D.N.M. 1989); *In re Miles*, 96 Bankr. 348, 350 (Bankr. N.D. Fla. 1989); *In re Curry*, 77 Bankr. 969, 970 (Bankr. S.D. Fla. 1987).

Only three decisions discuss the constitutional issues relating to denial or confirmation of Chapter 13 plans based on a debtor's decision to make religious contributions. See *Miles*, 96 Bankr. at 350 (refers to the holding of *In re Green*, 73 Bankr. 893 (Bankr. W.D. Mich. 1987) that to deny confirmation on the basis of a religious contribution would constitute violation of the constitutional separation of church and state, but declines to follow *Green* without analysis); *Navarro*, 83 Bankr. at 352, 353 (the free exercise clause is not an issue and confirmation of a plan in which the debtor proposes to continue religious contributions does not violate the establishment clause); *Green*, 73 Bankr. at 895, aff'd 103 Bankr. 852 (W.D. Mich. 1988) (denial of confirmation on the basis of religious contributions would violate free exercise clause and confirming a

plan which includes religious contributions does not violate the establishment clause).

Of the foregoing decisions, apparently only one was appealed, and that appeal was by a well-financed creditor (the Michigan Department of Education, which was the holder of an unpaid student loan). See *Green*, 103 Bankr. 852. Apart from the Ivys' appeal, there do not appear to be any appeals brought by debtors on this issue.

CONCLUSION

Ours is a religious society. Approximately forty-nine percent of the U.S. population are "Christian Church Adherents" and two and a half percent of the population are Jewish. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1990*, at 58 (110th ed.). During the fiscal year ending June, 1990, approximately 200,000 petitions for relief under Chapter 13 were filed in the United States bankruptcy courts. Administrative Office of the U.S. Courts, *Bankruptcy Statistical Information* (Sept. 1990). Restricting the right to tithe in Chapter 13 therefore potentially affects thousands of debtors, who will be forced to give up one of their most sacred duties to their God as a condition to receiving a "fresh start" in Chapter 13.

For all of the reasons set forth in this Petition, this Court should issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Ninth Circuit.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

In re: STEVEN [sic] IVY; CHARLENE IVY, Debtors.	No. 88-3769
STEVEN [sic] IVY; CHARLENE IVY, Plaintiffs-Appellants, v. ROBERT W. MYERS, Trustee, Defendant-Appellee.	D.C. No. CV-88-141-FR MEMORANDUM* (Filed Dec. 10, 1990)

Appeal from the United States District Court
for the District of Oregon (Portland)
Helen J. Frye, District Judge, Presiding

Argued and Submitted October 1, 1990
Seattle, Washington

Before: HUG and DW NELSON, Circuit Judges, WALKER,** District Judge

Debtors Steven and Charlene Ivy appeal the district court's affirmance of the bankruptcy court's denial of confirmation of their proposed reorganization plan under

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Hon. Vaughn R. Walker, United States District Judge for the Northern District of California, sitting by designation.

Chapter 13 of the Bankruptcy Code. The Ivys contend that the bankruptcy court's denial of their plan, which included a monthly tithe to their church based on ten percent of their annual income, unconstitutionally burdened their right to the free exercise of their religion in violation of the First Amendment to the United States Constitution. We have jurisdiction under 28 U.S.C. § 158(d), and we affirm.

A Chapter 13 reorganization plan may not be confirmed unless the debtor proposes to pay into the plan all of the debtor's disposable income. 11 U.S.C. § 1325(b)(1)(B). "Disposable income" is defined in relevant part under the Code as "income which is received by the debtor and which is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor." *Id.* § 1325(b)(2)(A).

This definition comports with the Code's requirement that a plan only be confirmed if it is proposed in good faith. *Id.* § 1325(a)(3). While not defined expressly in the Code, "good faith" has been held to require, "at least, that the debtor is willing to pay to the trustee for the benefit of his creditors *all* of his disposable income after provision for his necessary and reasonable living expenses and a reasonable contingency." *In re Curry*, 77 Bankr. 969, 969 (Bankr. S.D. Fla. 1987) (emphasis added).

In the present case, the Ivys' plan, along with the monthly tithe, proposed 36 monthly payments to unsecured creditors amounting to payment of approximately 27 percent of their total unsecured debt. The bankruptcy court denied the plan, concluding that, under these circumstances, the monthly charitable contribution

did not constitute a reasonably necessary living expense. The court found that the plan's exclusion of the tithe from the amount of disposable income payable to the Ivys' creditors would effectively require the creditors to contribute to the Ivys' chosen charity.

It is not necessary for us here, however, to determine whether the tithe constituted a reasonably necessary living expense or whether denial of the plan amounted to an unconstitutional infringement on the Ivys' freedom to practice their religion. In denying the plan, the bankruptcy court indicated it would confirm an amended plan that allowed the proposed monthly tithe if the Ivys would extend their 24 monthly payments of $745 an additional 18 months. Eighteen additional monthly payments of $745 would amount to an additional $13,410 of payments available to the Ivys' creditors. As the bankruptcy court pointed out, this would have resulted in payments into the plan in "the same amount that somebody who was not required to tithe would have paid in a period of 36 months," the length of time initially proposed in the Ivys' plan.

Thus, the bankruptcy court, rather than ruling that the existence of the tithe was, under any circumstances, an unreasonable living expense, instead presented the Ivys an alternative that would have allowed the tithe in the proposed amount at no expense to the Ivys' creditors. This alternative would have provided satisfactory payment to creditors while simultaneously accommodating the Ivys' sincerely held religious beliefs. In rejecting the amended plan, the Ivys instead sought to choose accommodation of their religious beliefs at the expense of their creditors. We decline to hold that this satisfies the Code's

requirements. Accordingly, the judgment of the district court is **AFFIRMED.**

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re:	Bankruptcy No. 387-02293-H13
STEVEN [sic] IVY and CHARLENE IVY,	Civil No. 88-141-FR
Debtors.	OPINION
	(Filed March 11, 1988)

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Trustee

FRYE, Judge:

In the matter before the court, the debtors, Steven [sic] and Charlene Ivy, appeal from an order of the Honorable Henry L. Hess, Jr., United States Bankruptcy Judge, denying confirmation of their reorganization plan submitted pursuant to Chapter 13 of the United States Bankruptcy Code.

The reorganization plan submitted by the Ivys to Judge Hess indicates that they owe $8,525 in back taxes and $53,360 in unsecured debts. The reorganization plan calls for thirty-six monthly payments to creditors: four payments of $200; eight payments of $595; and twenty-

four payments of $745. The reorganization plan also provides for a household budget, which includes a monthly tithe to the Ivys' church in the sum of $365 per month.[1]

Judge Hess denied confirmation of the reorganization plan but indicated to the Ivys that an amended plan would be confirmed if it provided for forty-two monthly payments of $745 to creditors rather than twenty-four monthly payments of $745 to creditors. Judge Hess reasoned that the Ivys should be required to pay to their unsecured creditors the same amount that debtors who did not tithe would have to pay to their unsecured creditors.

The Ivys argue that the failure of Judge Hess to confirm their reorganization plan was an unconstitutional infringement upon their first amendment right to freely exercise their chosen religion and imposes upon them a substantial burden because of their religious beliefs.[2]

APPLICABLE LAW

This court reviews the determination of the bankruptcy court *de novo*. *In re American Mariner Indus., Inc.*, 734 F.2d 426, 429 (9th Cir. 1984).

A reorganization plan will not be confirmed unless the bankruptcy court finds that the plan has been proposed in good faith. 11 U.S.C. § 1325(a)(3) (1985). Good

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[1] Tithing is the donation of ten percent of a household's income to a church. The Ivys' net after-tax income in 1986 was $37,787. The Ivys contributed $3,654 in 1986 to their church.

[2] This court accepts as true the Ivys' statement that their beliefs are sincere and that tithing is a regular family practice.

faith requires that debtors be willing to pay to their trustees, for the benefit of their creditors, all of their disposable income after provision for their necessary and reasonable living expenses and a reasonable contingency. *In re Sturgeon*, 51 Bankr. 82, 83 (Bankr. S.D. Ind. 1985).

ANALYSIS AND DECISION

The Ivys argue that *In re Green*, 73 Bankr. 893 (Bankr. W.D. Mich. 1987), is persuasive on the issue before the court because it is the only decision that deals with tithing from a constitutional standpoint. In *Green*, the State of Michigan, an unsecured creditor of Green, objected to the confirmation of Green's reorganization plan because the plan included a monthly tithe as an expense. The court confirmed the plan, and in so doing, stated that it could not deny confirmation solely based on tithing, nor could it condition confirmation upon the debtors ceasing to tithe.

Green is distinguishable from this case, however. In denying confirmation of the Ivys' reorganization plan, Judge Hess stated that he would allow the Ivys to tithe, but would require the Ivys to pay their debts just as other debtors who did not tithe would have to pay their debts. While the court denied the confirmation of Ivys' reorganization plan, the court did not require the Ivys to cease tithing. Instead, the court proposed an amended reorganization plan which would allow the Ivys to freely practice their religion as well as to satisfy their legal obligations to their creditors.

The bankruptcy court's denial of the Ivys' reorganization plan is affirmed.

DATED this 11 day of March, 1988.

/s/ Helen J. Frye
Helen J. Frye
United States
District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re	)	Case No.
	)	387-02293-H13
STEPHEN C. IVY	)	SUPPLEMENTAL
CHARLENE R. IVY	)	OPINION
Debtors.	)	(Filed Nov. 27, 1987)
	)	
	)	Unpublished

At the adjourned hearing on confirmation in this case on August 13, 1987, the court rendered its oral opinion denying confirmation of the debtors' Chapter 13 Plan. This opinion supplements that oral opinion.

The court in the case of *In re Curry* (Bkrtcy. S.D. Fla. 1987), 77 B.R. 969 held that a plan providing for a distribution of 26% upon general unsecured claims was in bad faith. The plan provided monthly payments of $125 for three years. In his statement of income the debtor stated that he deducted $103 as a payroll deduction for "tithe to church deducted from pay." This voluntary contribution represented almost half of the debtor's disposable income after payment of his necessary living expenses. At page 969 the court states:

> Good faith requires, at least, that the debtor is willing to pay to the trustee for the benefit of his creditors all of his disposable income after provision for his necessary and reasonable living expenses and a reasonable contingency. A charitable contribution, at least to the degree provided in this case, does not constitute a reasonably necessary living expense. The effect of such a deduction is to permit the debtor to require that his creditors contribute to his chosen charity. I do not believe that the statute

contemplates such a result nor do I consider that I have discretion to permit this debtor to achieve that result.

I do not overlook the fact that there are published opinions by several of my colleagues who have reached a contrary result. Nor have I overlooked the fact that Official Form 10, authorized by B.R. 9009, provides a space to list "religious and other charitable contributions" in the debtor's budget, item 4(b)(15). The Official Forms do not override the statute. They were not approved by Congress nor by the Rules Committee. Therefore, they provide no indication of legislative intent. The Forms, though prescribed by the Judicial Conference (B.R. 9009) do not, I take it, constitute judicial precedent that religious and charitable contributions may, in effect, be imposed by a chapter 13 debtor upon his creditors.

The Confirmation of the debtor's plan is denied. The debtor is granted leave to amend his plan to increase his monthly payment in the amount of $103, the voluntary payroll deduction presently provided for the benefit of his employer church. In all other respects, the plan meets the requirements for confirmation.

This court agrees with the reasoning of *In re Curry*.

DATED this 27th day of November, 1987.

/s/ Henry L. Hess, Jr.
Henry L. Hess, Jr.
Bankruptcy Judge

cc: Robert J. Vanden Bos

APPENDIX D

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

BEFORE THE HONORABLE HENRY L. HESS
Bankruptcy Judge

In re	)	No. 387-02293-H13
	)	
STEPHEN and CHARLENE IVY,	)	ADJOURNED
	)	CONFIRMATION HEARING
Debtors.	)	
	)	Partial transcript,
	)	examination and Court's
	)	oral ruling

TRANSCRIPT OF PROCEEDINGS

August 13, 1987

Recorded by:
Lee Swaney

SOFT-TECH
Recording and Transcribing Services
615 2nd Street – Oregon City, OR 97045 – (503) 655-5443

* * *

EXAMINATION

(Of Stephen Ivy)

[p. 10] BY THE COURT:

Q When I go through the budget – not, the budget, but the Chapter 13 statement that lists the debts, you

show taxes owing of $8524, and, including those, you show a total unsecured debts of $53,360. When I look at the unsecured debts, except for minor exceptions, they all appear to be charge accounts and credit cards?

A That's correct. The majority of those are indeed – these are the type of accounts that have cash withdrawals on them, and that was used – that was the method of income I used during the time I was starting a new business.

[p. 11] Q So some of this money went into a new business?

A A large percentage of it, yes.

Q I see. Did you inform any of these people from whom you borrowed money that you might not be able to repay because you do have an obligation to tithe, or you wouldn't be able to pay as much as some other person would?

A No, because I'd had a history – most of those people I'd been with for a long, long time and had a history of being able to repay, including my tithe.

Q You recognize that there's at least some moral obligation to repay your debts?

A Yes, sir.

Q I presume that would fit within your religious beliefs?

A That's right. The religious beliefs is that the Lord comes first, and you take your tithe out of your income first, and then you meet the rest of your obligations.

Q Well, I made some calculations that I find that you've limited this plan to 36 months. Your plan provides that you pay four payments – to the trustee, four payments of $200, eight payments of 595, and 24 payments of 745.

A Yes.

Q If, for another person in your circumstances whose religious beliefs did not require tithing, that person would be able to pay in addition to those sums $365 a month?

[p. 12] A Yes.

Q And for – at 36 months, that would mean that that person, who was not required to tithe because of his beliefs, would be paying an additional $13,140 that could be distributed to creditors.

A Yes.

Q You could do that just continuing this plan for an additional 18 months. An additional 18 months at $745 would pay an additional $13,140 to your creditors. If, instead of ending the plan in three years, if you went an additional 18 months, you would have paid into the plan the same amount that somebody who was not required to tithe would have paid in a period of 36 months.

A Hm-hmm. Okay. I follow.

Q Now, I'm wondering if you have any objection to doing that?

A Yeah, I think I could do that.

Q It's hard to believe under those circumstances that this plan should not be confirmed. But the Court would confirm a plan that called for payments of 200 – four payments of $200, eight payments of 595 and – what would that be – and 42 payments of 745, and that would allow you to continue to tithe, but yet pay your creditors the same amount some other person would pay in the period of 36 months.

[p. 13] A Yes.

Q All right. That will be the order of the Court.

THE COURT: Well, if we can handle that by – if that's the debtor's wish, we can handle that just by a simple amendment to paragraph 1 to change the figure of 24 months to a figure of – what did I say? – change the 24 to 42.

Now, I don't know what that would work out in percentages. We do need a calculation here. It probably amounts to, I would say – the way I calculated it, yes, there would be for – available for general unsecured creditors actually 33 percent.

If you take the total payments that this debtor would make, take out the trustee's commission of 16 – or six percent, then provide payment in full to the priority creditors, that would leave 14,000 to go to general unsecured creditors.

And if I've got that figure right – I looked at the summary sheet – no, it's – I'm wrong.

MR. VANDEN BOS: We figured, Your Honor –

THE COURT: No, I'm wrong. I used a figure that excluded the 8,000. But I see they're listed separately. It is 53, but I would – anyway, it leaves – the plan, as proposed, would have a balance of $14,638 that would go to unsecured creditors. By paying an additional 13 percent, it almost doubles the dividend to unsecured creditors.

[p. 14] So I suppose the amendment would have to be – would change 24 months to 42 months, and we'd change paragraph 2(d) to read "approximately" rather than an exact figure, approximately 52 percent – er, I think it would be about 52 percent.

So, Mr. Vanden Bos, if you'd submit a proposed order of confirmation showing those two amendments, then the Court will enter it.

MR. VANDEN BOS: Okay. I'll discuss those with my client, Your Honor, and if that's his intention, we'll submit the order immediately.

THE COURT: Yes. I understand. I'm not – I don't feel I want to bind the debtor right now. But I'm saying that I will refuse confirmation of the present plan, and that I would not confirm a plan that didn't do what these amendments would suggest.

Now, the debtor can decide whether he wants to do that or not do that after he receives your advice.

MR. VANDEN BOS: I understand.

THE COURT: All right.

MR. VANDEN BOS: Thank you, Your Honor.

THE COURT: There are a few things that I wanted to say, since the debtor seemed to agree with me on that suggestion, I probably ought to say some things in the event that he decides that's not what he wants to do, just to make [p. 15] them a part of the record.

The reason I would deny the present plan is that Chapter 13 is for the adjustment of debts. It concerns legal obliga-tions [sic] and not moral obligations. Outside of bankruptcy, gifts, when made while insolvent, can be termed fraudulent conveyances. In a Chapter 7 it could very well be that a Chapter 7 trustee could set aside contributions made to a church for the 12-month period prior to the filing of the bankruptcy because they're gifts without consideration at a time when the debtor's insolvent.

MR. VANDEN BOS: I –

THE COURT: Yes, I think that's true.

MR. VANDEN BOS: Have you seen that done?

THE COURT: Well, you can argue – No, but I see no reason why it couldn't be.

MR. VANDEN BOS: I understand, Your Honor.

THE COURT: Outside of bankruptcy on a garnishment, a debtor is entitled to claim as exempt 75 percent of the net earnings after lawful deductions, or deductions required by law. A debtor cannot claim his obligation to tithe against a garnishment. That would have to come out – if he's going to tithe, it would have to come out of the 75 percent. It's not a deductions required by law.

And the Court doesn't believe that the amounts which the creditors receive in a Chapter 13 case should depend upon [p. 16] whether the debtor desires to make charitable contributions, even though it's required by his religion. This Court believes that such a debtor has the same obligation to pay debts as anyone else.

I estimate that the – I would guess that there are many fewer less than – there's less than five percent of the cases filed where there's any deduction shown for tithing or religious contributions. It just doesn't seem fair to me that a person in that position – fair to the creditors that a person in this debtor's position should receive less than would creditors in a case where the income was the same and the other expenses are the same except that that debtor was not required by his beliefs to tithe.

And that's why I think that in his instance, it really isn't good faith to – for this debtor to get by with 36 months of payments. I think he should stretch his plan out so that his creditors will receive the same as if the next individual had the same income and the same monthly expenses would return to his creditors.

So those are my reasons.

MR. VANDEN BOS: Thank you, Your Honor.

(Proceedings concluded this 13th day of August 1987.)

APPENDIX E

11 USC § 1322(c)

§ 1322. Contents of Plan.

* * *

(c) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

11 U.S.C. § 1325

§ 1325. Confirmation of plan.

(a) Except as provided in subsection (b), the court shall confirm a plan if –

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan –

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b)(1) If the trustee or the holder of any allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended –

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

11 U.S.C. 1329(a)

§ 1329. Modification of plan after confirmation.

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to –

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

* * *

Bankr. Rule 3020(b).

DEPOSIT; CONFIRMATION OF PLAN

* * *

(b) Objections to and Hearing on Confirmation.

(1) Objections. Objections to confirmation of the plan shall be filed with the court and served on the debtor, the trustee, any committee appointed under the Code and on any other entity designated by the court, within a time fixed by the court. An objection to confirmation is governed by Rule 9014.

(2) Hearing. The court shall rule on confirmation of the plan after notice and hearing as provided

in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

* * *

Bankr. Rule 9009.

FORMS

The Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate. Forms may be combined and their contents rearranged to permit economies in their use. The Director of the Administrative Office of the United States Courts may issue additional forms for use under the Code.

Supreme Court, U.S.
FILED
MAY 24 1991
OFFICE OF THE CLERK

No. 90-1445

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STEPHEN IVY AND CHARLENE IVY,
Petitioners,

v.

ROBERT W. MYERS,
Respondent.

Brief In Opposition To Petition For Writ Certiorari

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17p

QUESTION PRESENTED

Was petitioners' entitlement to free exercise of their religion impermissibly burdened where:

(1) The Bankruptcy Court offered to approve petitioners' Chapter 13 reorganization plan, including an allowance for religious tithes, if petitioners would extend the term of that plan so that their creditors would not be prejudiced by petitioners' tithing; and

(2) Petitioners rejected the Bankruptcy Court's reasonable accommodation of their religious practices?

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STATEMENT OF THE CASE

Respondent accepts petitioners' statement of the case.

REASONS TO DENY THE WRIT

A. This Case Is Not Worthy Of Supreme Court Review.

This appeal appears to present intriguing issues concerning the interplay between the First Amendment and the bankruptcy laws: Must creditors subsidize a debtor's choice of charities? What is the "reasonably necessary" expense of religious observance--and, perhaps, of salvation? What is the proper application of Employment Div., Dep't of Human Resources v. Smith, 494 U.S. ____, 108

L.Ed.2d 876 (1990), in a non-criminal context?

There is less here than meets the eye. Intriguing though these issues may be, this case is a flawed vehicle for resolving them.

This is so for three reasons. First, this case does not cleanly present the "tithe" vs. "no tithe" issue. The bankruptcy court did not require the Ivys to forego tithing as a condition of Chapter 13 relief. Rather, the court attempted to reasonably accommodate the Ivys' religious practices by offering a compromise, an 18-month extension of the Ivys' payment period, which would have permitted petitioners to continue to tithe without prejudicing their creditors. Most

simply, the Ivys could have paid their creditors the same amount over 54 months, while tithing, as they would have paid their creditors over 36 months, without tithing.

The Ivys rejected this reasonable accommodation.

Thus, the "free exercise" burden at issue in this case is not a complete prohibition on all tithing as a condition of Chapter 13 plan approval. It is, rather, an extended repayment period, coupled with tithing, as a condition of Chapter 13 approval. So restricted, that burden--this case--does not warrant this Court's scrutiny.

Second, in a related sense, because of the peculiar facts of this case, the lower courts did not reach the

constitutional issues petitioners raise. Instead, those courts simply held that even assuming the Ivys had some constitutionally protected entitlement to tithe while pursuing Chapter 13 relief, the bankruptcy court's proposal represented a reasonable accommodation of that entitlement. See Petition for Writ of Certiorari at App. 3-4, 7.

The record is, thus, underdeveloped. Whatever benefit this Court derives from a "percolating" of the issues during the appellate process is not present here.

Third, this Court will have other, better, opportunities to address these issues. As petitioners' survey of allegedly "conflicting" lower court decisions shows, there have been nearly

a dozen reported bankruptcy/tithe decisions in the last five years. See Petition for Writ of Certiorari at 14-17. Nearly all of these have been of the pure "tithe" vs. "no tithe" variety.

It is best to wait.

B. The Ninth Circuit's Holding Does Not Conflict With Holdings of Other Lower Courts.

Petitioners note, correctly, that there is a split among various lower district and bankruptcy courts over the proper treatment of tithes in bankruptcy. However, the bankruptcy court's disposition in this case, as affirmed by the Ninth Circuit, does not conflict with any reported decision.

Only one other court has addressed the propriety of the sort of "reasonable

accommodation" plan extension proposed by the bankruptcy court in this case. See In Re Wood, 92 Bankr. 264 (Bkrtcy. S.D. Ohio 1988). That court confirmed such an extension. Id. (confirming inclusion of $43 monthly church tithe in Chapter 13 plan, where proposed repayment period was 56 (not 36) months, if extended repayment period produced a "significantly higher dividend" for general unsecured claimants than would have been paid if objection to confirmation had been sustained).

Finally, it must be emphasized that there is no conflict of authority at the court of appeals level. For now, there has been only one reported bankruptcy/tithe at the district court

level. See In Re Green, 103 Bankr. 853 (W.D. Mich. 1988).

Only this case (which was unreported at the district court level) has reached the court of appeals level. The Ninth Circuit's disposition here is, of course, unpublished.

C. The Ninth Circuit's Holding Does Not Conflict With Decisions of This Court.

Petitioners' argument that the Ninth Circuit's holding conflicts with this Court's First Amendment decisions, specifically including Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1987), fails for four reasons:

First, Hobbie antedated Employment Div. Dep't of Human Resources v. Smith, 494 U.S. ____, 108 L.Ed.2d 876 (1990). In Employment Div. v. Smith, this Court

held that Oregon's prohibition on use, including sacramental use, of peyote did not unconstitutionally burden the free exercise of religion. In so holding, this Court emphasized that any burden on religious practice resulting from even-handed application of a facially neutral and generally applicable regulation does not violate the Free Exercise Clause: "We have never held that an individual's religious belief excused him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." 108 L.Ed.2d at 885.

Here, there is no suggestion that the bankruptcy court treated petitioners' religious tithe any differently than it would have treated a secular charitable contribution.

Rather, the court adhered to a facially neutral and generally applicable principle that Chapter 13 creditors should not be required to subsidize a debtor's choice of charities. Charity, whether religious or secular, begins at home. Given this neutrality, there could be no violation of the Free Exercise Clause.

Second, this Court in Smith noted that the test set forth in Sherbert v. Verner, 374 U.S. 398 (1963), on which Hobbie turned, has never been applied to invalidate any governmental action "except the denial of unemployment compensation." See 108 L.Ed.2d at 888. Thus, Hobbie (and related authority pertaining to denial of unemployment

compensation benefits) appears to be constitutionally sui generis.

Third, while Hobbie involved the potential loss of government benefits, the bankruptcy court under Chapter 13 does not award or deny substantive governmental benefits. Instead, the court engages in a balancing and adjusting of the interests of private parties according to neutral statutory principles. See, e.g., In Re Navarro, 83 B.R. 348, 352 (Bkrtcy. E.D. Pa. 1988), citing United States v. Lee, 455 U.S. 252 (1982).

Fourth, to the extent that bankruptcy discharge is deemed a substantive governmental benefit, debtors can secure that "benefit," while still tithing, by converting their

Chapter 13 bankruptcy into a Chapter 7 bankruptcy. See, e.g., In Re Navarro, supra, 83 B.R. at 353; In Re Curry, 77 B.R. 969 (Bkrtcy. S.D. Fla. 1987). While the wisdom of encouraging debtors to convert to a Chapter 7 proceeding may be debated, that selection of discharge options does not have constitutional implications.

Smith, not Hobbie, controls. The bankruptcy court's "reasonable accommodation" did not unreasonably burden petitioners' free exercise of religion.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 24th day of May, 1991.

LINDSAY, HART, NEIL & WEIGLER

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No. 90-1445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STEPHEN IVY AND CHARLENE IVY,
Petitioners,

v.

ROBERT W. MYERS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1445

STEPHEN IVY AND CHARLENE IVY,
PETITIONERS,

v.

ROBERT W. MYERS,
RESPONDENT.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The Council on Religious Freedom is a national non-profit corporation which was formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals, some in an official capacity and some on a lay basis, who are active in religious affairs and who recognize the importance of preserving and promoting the constitutional principle of the free exercise of religion and opposing any encroach-

ment by private or governmental agencies, including the judicial branch of government, which limits or tends to inhibit the free exercise of religion. The Council on Religious Freedom therefore opposes government burdens on religious practices or government actions requiring an individual to choose between the practice of his or her religion and governmental benefits otherwise available to him.

This case, amicus believes, requires this Court to interpret the federal bankruptcy statute in connection with certain religious beliefs and practices and, if necessary, determine what effect the Free Exercise and Establishment Clauses of the First Amendment may have on the confirmation of Chapter 13 plans under the federal bankruptcy law.

Both petitioners and respondent, through their respective counsel of record, have consented to the filing of this brief. Their letters of consent accompany the filing of this brief.

SUMMARY OF ARGUMENT

The Bankruptcy Court refused to allow petitioners' Chapter 13 plan for the sole reason that they had included as part of their "reasonable and necessary" living expenses an entry for "tithe" payments to their church.

The bankruptcy statute has not clearly stated whether the inclusion of religious contributions are proper even though the Official Form has provided a space to list "religious and other charitable contributions." Because any prohibition against including religious contributions as part of a debtor's Chapter 13 plan would raise important and sensitive constitutional concerns, the Act should

be construed to permit the inclusion of such contributions in an approvable plan.

The courts below all failed to apply First Amendment analysis when determining that the plan was not approvable under Chapter 13 of the Bankruptcy Act. The Petition for Writ of Certiorari should be granted to determine whether the Free Exercise Clause of the First Amendment requires a determination that tithe and other religious contributions may be properly allowed as part of a Chapter 13 plan.

This case is not unlike *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and the test set forth therein should be applied since the benefits provided by government under Chapter 13 are similar to the employment benefits at issue in *Sherbert*. The *Sherbert* analysis should also be coupled with Justice O'Connor's further analysis concerning the "apparent" conflict between free exercise interests and establishment concerns as set forth in her concurring opinion in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985).

This case is clearly distinguishable from *Employment Div., Dep't of Human Resources* v. *Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), *rehearing denied*, 110 S. Ct. 2605 (1990), since it does not involve conduct made criminal and lends "itself to individualized governmental assessment of the reason for the relevant conduct." *Id.* at 1603.

This case demonstrates the need for judicial guidance concerning federal legislation in an area where, today, the lower courts, as well as counsel, have no clear legislative or judicial chart to follow.

STATEMENT OF THE CASE

This case came before the Bankruptcy Court on Petitioners Stephen and Charlene Ivys' Motion for Con-

firmation of their Chapter 13 plan under the federal bankruptcy statute. The Bankruptcy Court denied confirmation of the plan on the basis that the debtors' household budget contained an expense entry of $365.00 per month for a "tithe" to debtors' church. The Ivys are members of the Hillsboro Church of the Nazarene. The Church of the Nazarene follows Christian tenets which mandate tithing of one's income—that is the contribution of 10% of one's income to the church annually. The Ivys sincerely believe that it would be a violation of the teachings of their church as well as their own personal religious convictions if they decreased or deleted their contributions to the church.

The Bankruptcy Court, somewhat paradoxically, refused to allow the deduction and denied confirmation on the grounds that such a plan was not proposed in good faith, although no interested party filed objection to confirmation. The Bankruptcy Court in its supplemental opinion adopted the language of the Bankruptcy Court in the case of *In re Curry*, 77 Bankr. 969 (Bankr. S.D. Fla. 1987), which stated:

> Good faith requires, at least, that the debtor is willing to pay to the trustee for the benefit of his creditors all of his disposable income after provision for his necessary and reasonable living expenses and a reasonable contingency. A charitable contribution, at least to the degree provided in this case, does not constitute a reasonable necessary living expense. The effect of such a deduction is to permit the debtor to require that his creditors contribute to his chosen charity. I do not believe that the statute contemplates such a result nor do I consider that I have discretion to permit this debtor to achieve that result.
>
> I do not overlook the fact that there are published opinions by several of my colleagues who have

> reached a contrary result. Nor have I overlooked the fact that Official Form 10, authorized by B.R. 9009, provides a space to list "religious and other charitable contributions" in the debtor's budget, item 4(b)(15). The Official Forms do not override the statute. They were not approved by Congress nor by the Rules Committee. Therefore, they provide no indication of legislative intent. The Forms, though prescribed by the Judicial Conference (B.R. 9009) do not, I take it, constitute judicial precedent that religious and charitable contributions may, in effect, be imposed by a Chapter 13 debtor upon his creditors.

(*See* Appendix C at App. 9-10 as set forth in the Petition for Writ of Certiorari.)

The United States District Court for the District of Oregon, reviewing the Bankruptcy Court's decision *de novo*, sustained the bankruptcy judge's decision holding that 11 U.S.C. § 1325(a)(3) (1985) requires that the plan be proposed in good faith and that "[g]ood faith requires that debtors be willing to pay their trustees, for the benefit of their creditors, all of their disposable income after provision for their necessary and reasonable living expenses in a reasonable contingency." (*See* Appendix B at App. 6-7 to the Petition for Writ of Certiorari.)

The case was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit avoided ruling on the question of whether tithe constitutes a "reasonable and necessary" living expense or whether denial of the plan amounted to an unconstitutional infringement of the Ivys' freedom to practice their religion. (*See* Appendix A at App. 3 to the Petition for Writ of Certiorari.) In denying the plan, the Bankruptcy Court indicated that it would confirm an amended plan that allowed the proposed monthly tithe if the Ivys would extend their 24 monthly payments of $745 an additional 18 months.

The Ivys argue that the burden on the free exercise of religion is not avoided by the bankruptcy judge's proposal to extend the plan for 18 months since the proposed extension would discriminate by requiring the Ivys to pay more and being under the jurisdiction of the Bankruptcy Court longer than a non-tithing debtor in the same circumstances, thereby placing substantial burdens on the debtors' right to freely exercise their religion. (Petition for Certiorari at 6.)

The trustee in bankruptcy argued in his brief before the Ninth Circuit that confirmation of a Chapter 13 plan providing for a church tithe is not required by the Free Exercise Clause and in fact would violate the Establishment Clause because it would "'convey a message that religion or a particular religious belief is favored or preferred.'" (Brf. of Trustee-Appellee Robert W. Myers filed in Ninth Circuit Court of Appeals at 12).

ARGUMENT I

CERTIORARI SHOULD BE GRANTED TO EXAMINE THE QUESTION OF WHETHER THE PAYMENT OF TITHE OR OTHER RELIGIOUS CONTRIBUTIONS SHOULD BE INTERPRETED TO BE A "REASONABLE AND NECESSARY" LIVING EXPENSE UNDER CHAPTER 13 OF THE FEDERAL BANKRUPTCY LAW.

Council on Religious Freedom believes that certiorari should be granted in this case to examine the question of whether the payment of tithe or other religious contributions, as mandated by an individual's religious beliefs, should be interpreted to be a "reasonable and necessary" expense in a Chapter 13 plan or whether, conversely, the inclusion of such amount should require a determination that the plan was not proposed in good faith for the sole reason that such contributions were included as part of the plan.

Numerous district court decisions have specifically addressed the propriety of religious contributions being made by a debtor during his Chapter 13 plan. Four cases hold that a religious contribution is a "reasonable and necessary" expenditure. *See In re Bien*, 95 Bankr. 281 (Bankr. D. Conn. 1989); *In re Navarro*, 83 Bankr. 348 (Bankr. E.D. Pa. 1988); *In re Wood*, 92 Bankr. 264 (Bankr. S.D. Ohio 1988); and *In re Davis*, 68 Bankr. 205 (Bankr. S.D. Ohio 1986). One case, *In re Green*, 73 Bankr. 893 (Bankr. W.D. Mich. 1987), *aff'd*, 103 Bankr. 853 (W.D. Mich. 1988), held that a denial of confirmation on the basis of a religious contribution would violate the Free Exercise Clause of the First Amendment and also concluded that confirmation did not violate the Establishment Clause.

Although the conflict between bankruptcy courts on this issue does not by itself justify the granting of certiorari, more is at stake here. The free exercise implications of such cases strongly suggest that there be uniformity in addressing debtor plans implicating religious benefits and practices that require confirmation by a federal judge. *See St. Martin Evanglical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780 n.10 (1981), and *Heffron* v. *International Soc. of Krishna Consciousness*, 452 U.S. 640, 646 (1981).

A reading of 11 U.S.C. § 1325(b) fails to clearly disclose whether the payment of tithe as mandated by an individual's religious belief should be included as a "reasonable and necessary" living expense. With the increase of bankruptcy filings, bankruptcy judges are without guidance as to whether a plan (including the payment of tithe or other religious contributions) should be viewed as having been made in good faith. Likewise, those individuals who find it necessary to seek the protection and benefit of Chapter 13

proceedings have no guidance as to whether they may proceed with a Chapter 13 plan when their religion dictates that 10% of their income be paid as tithe to their church.

This amicus believes that failure to include the payment of religious contributions mandated by an individual's religious beliefs as a "reasonable and necessary" expense by necessity raises sensitive questions of First Amendment concern. This Court in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979), expressly held that "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the [National Labor Relations] Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

This case involves, in part, the interpretation of a federal statute. Although the amount of money involved may appear to be insignificant, the principle is not. Because we are dealing with those in financial distress, it is unlikely that this Court will be asked again soon to review this question. But that does not mean that the question raised is seldom seen at the bankruptcy court level. Unfortunately, many debtors face this unsettled, but important, area of the law with no finances to bring the issue before the courts. For this reason, this Court should grant the Petition for Writ of Certiorari.

ARGUMENT II

CERTIORARI SHOULD ALSO BE GRANTED TO DETERMINE WHETHER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT REQUIRES A DETERMINATION THAT TITHE AND OTHER RELIGIOUS CONTRIBUTIONS MAY BE ALLOWED IN A CHAPTER 13 PLAN.

The Council on Religious Freedom also believes that the petition should also be granted for the purpose of

examining whether the Free Exercise Clause of the First Amendment requires a determination that tithe and other contributions mandated by an individual's religious beliefs should be considered to be "reasonable and necessary" in a Chapter 13 plan or whether conversely such an allowed expense would constitute a violation of the Establishment Clause as argued by the trustee in bankruptcy below.

For many believers, tithing is a Bible-based mandate. Malachi 3:10, a text in the Old Testament, sets forth the principle of tithing followed by many churches, stating: "Bring ye all the tithes into the storehouse, that there may be meat in mine house, and prove me now herewith, saith the Lord of hosts, if I will not open you the windows of heaven, and pour you out a blessing, that there shall not be room enough to receive it." And the New Testament, quoting the words of Christ, states in Luke 11:42: "But woe unto you, Pharisees! for ye tithe mint and rue and all manner of herbs, and pass over judgment and the love of God; these ought ye to have done, and not to leave the other undone." A contemporary author defines the concept this way: "Christian tithing is the self-discipline of setting aside regularly for Christ's work a tithe of one's income as an acknowledgment of God's ownership of all things, including man himself, and as a response to God's love as revealed in Jesus Christ." Kendall, *Tithing: A Call to Serious Biblical Giving* 29 (1982).

Tithing is an important aspect of church life in many religious groups. One study, based on statistics supplied by the Department of Stewardship and Benevolence of the National Council of Churches, indicated that ten Protestant denominations "placed strong emphasis upon tithing" and another ten generally encouraged tithing. Powell, *Money and the Church* 224-5 (1962).

Some denominations consider tithing to be a core religious belief. The Seventh-day Adventist Church, for example, states this in its fundamental belief on stewardship:

> We are God's stewards, entrusted by Him with time and opportunities, abilities and possessions, and the blessings of the earth and its resources. We are responsible to Him for their proper use. We acknowledge God's ownership by faithful service to Him and our fellow men, and by returning tithes and giving offerings for the proclamation of His gospel and the support and growth of His church.

Fundamental Belief 20, *Seventh-day Adventist Church Manual* 29 (1990). A co-founder of the Seventh-day Adventist Church, Ellen G. White, commented on the temporal blessings that are bestowed on the faithful:

> Whenever God's people, in any period of the world, have cheerfully and wilfully carried His plan in systematic benevolence and in gifts and offerings, they have realized the standing promise that prosperity should attend all their labors just in proportion as they obeyed His requirements. When they acknowledged the claims of God, and complied with His requirements, honoring Him with their substance, their barns were filled with plenty.

White, *Counsels on Stewardship* 347 (1940).

Another denomination, the Church of Jesus Christ of Latter-day Saints, also strongly promotes the tithing concept. The ninth president of that church, David O. McKay, stated that to Latter-day Saints "tithing is as much a law of God as is baptism." McKay, *Gospel Ideals* 197 (1953). McKay continued by noting that in addition to the social and temporal benefits of tithing, it "makes its greatest appeal to the sincere mind because of its spiritual signifi-

cance. It is an unfailing source of spiritual power." *Id.* at 199.

To tithepayers, there is no question but the return of tithe is a "reasonable and necessary" living expense. In fact, in keeping with the teachings of the Bible, many tithepayers believe that their secular labors will not be blessed if they do not abide by the Biblical plan of tithepaying. They normally are willing to sacrifice what other debtors might consider to be a "reasonable and necessary" expense in order to meet this Bible-mandated commitment to God.

None of the courts below applied First Amendment analysis in arriving at their decisions. This amicus believes that this case should be reviewed by this Court to ascertain if First Amendment principles are at stake and should have been considered by the lower courts.

ARGUMENT III

THE LOWER COURTS FAILED TO APPLY THE PROPER CONSTITUTIONAL ANALYSIS WHEN DETERMINING WHETHER PETITIONERS' CHAPTER 13 PLAN, INCLUDING RELIGIOUS CONTRIBUTIONS, SHOULD BE ALLOWED.

Under traditional free exercise analysis, as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), a substantial argument may be made that prohibiting the inclusion of a tithe expense as a regular part of a Chapter 13 plan, or a judicial conclusion that the inclusion of such an expense must result in the plan being found not to have been made in good faith, is violative of the Free Exercise Clause. The Bankruptcy Court's interpretation of Chapter 13 would in fact require the individual seeking the benefits of the bankruptcy statute to choose between his religious beliefs and the benefits afforded to other debtors under the bank-

ruptcy laws and/or place a greater burden on the debtor who sincerely believes that God has a prior claim to 10% of the individual's increase.

The bankruptcy judge and the courts below all failed to weigh on constitutional scales petitioners' request for inclusion of tithing in their Chapter 13 plan. Each court declined entirely to consider the impact of either the Free Exercise or Establishment Clauses in their determination. The benefits provided for an individual in financial distress under Chapter 13 are not unlike the benefits government has provided for individuals who find themselves unemployed. This Court held in *Sherbert* v. *Verner*, 374 U.S. at 404, that to disqualify an individual from unemployment benefits because of that person's inability to work during the hours of the individual's Sabbath places the same kind of burden upon the free exercise of religion as would a fine imposed against . . . [the individual] for her Sabbath worship." To condition an acceptable Chapter 13 plan on the exclusion of religious contributions has exactly the same effect.

Council on Religious Freedom believes that the lower courts should have utilized the analysis set forth by Justice O'Connor in her concurring opinion in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), where, in evaluating the apparent conflict between the Free Exercise and Establishment Clauses of the First Amendment, she stated:

> The solution to the conflict between the Religion Clauses lies not in "neutrality," but rather in identifying workable limits to the government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause

> values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer," *supra*, at 2500, is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

Id. at 83.

The trustee in bankruptcy argued to the Ninth Circuit that this Court's recent decision in *Employment Div., Dep't of Human Resources* v. *Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), *rehearing denied*, 110 S. Ct. 2605 (1990), forecloses petitioners' free exercise claim. In *Smith* this Court held that there should be no exemption from a generally applicable criminal law under the *Sherbert* test. But in *Smith* this Court noted that "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." *Smith*, 110 U.S. at 1603. The Court in *Smith* noted that the "good cause" standard which exists in unemployment compensation statutes "create[s] a mechanism for individualized exemptions."

Likewise, when a bankruptcy judge considers a Chapter 13 plan for approval, the judge must consider the "good faith" aspect of the petitioner when submitting a plan for approval. In fact, without the overlay of the *Sherbert* test in Chapter 13 confirmation hearings involving a plan which includes religious contributions, the decision as to approval or disapproval will tend to depend on the predilections of the court—not the beliefs of the petitioner—as to the reasonable necessity for that specific expense item.

An individual seeking the protection and benefits of Chapter 13 should not be forced to delegate to government the decision of whether it is a necessity to include a religious contribution as part of a household expense. That can and must be a matter that remains between the individual and his God. It likewise cannot, in our system of government, be left solely to the courts.

This case, however, must be differentiated from *Smith* because the bankruptcy statute here at issue is a law that lends "itself to individualized governmental assessment of the reason for the relevant conduct." *Id.* at 1603. The bankruptcy judge, in reviewing the Chapter 13 plan, must make an individual determination as to whether the religious contribution is a "reasonable and necessary" expense and whether the inclusion of such an expense in the plan nullifies the plan on the basis that it was not made in good faith. Also, the benefit at issue here—protection under Chapter 13 of the Bankruptcy Act—more closely approximates the benefit at issue in *Sherbert* v. *Verner*, and its progeny, than the criminal conduct which gave rise to the decision in *Smith*.

This Court has recently acknowledged that it has "on three occasions, invalidated state unemployment compen-

sation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Smith*, 110 S. Ct. at 1602. This Court should determine whether a Chapter 13 plan and the benefits derived by petitioners under such a plan should be conditioned upon a petitioner's willingness to abandon an equally important precept of his religious faith.

In *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947), and later in *Sherbert* v. *Verner*, 374 U.S. at 410, this Court stated the constitutional principle that government cannot "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."

A determination that a tithepayer must be excluded or treated differently than a non-tithepayer in the bankruptcy court's approval of a Chapter 13 plan contradicts the constitutional principle expressed in *Everson* and *Sherbert*.

The fact that bankruptcy courts have held both for and against inclusion of religious contributions as part of an approved Chapter 13 plan demonstrates that, without guidance from this Court, this sensitive religious issue will be left to the whims or caprice of the individual bankruptcy judges. Presently, courts and counsel are at a loss to know when the principles of *Sherbert* may still be applied. This case presents an opportunity for this Court to further address that question and to give guidance on such an important and sensitive constitutional concern.

CONCLUSION

For the foregoing reasons, this amicus curiae respectfully requests that the Petition for Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: April 10, 1991

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief *Amicus Curiae* of the National Legal Foundation in Support of Petitioners

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief *Amicus Curiae* of the National Legal Foundation in Support of Petitioners

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SUMMARY OF ARGUMENT

Guarding individuals' right to control their tithes against governmental coercion is the cornerstone of the First Amendment's protections. This understanding is buttressed by the historical struggle for religious liberty in

Virginia. By precluding Debtors' ability to seek the protection offered by the Bankruptcy Act on the same basis as non-tithing individuals, the lower courts have imposed a civil incapacitation on Debtors on account of their religious beliefs.

The U.S. Bankruptcy Courts, charged with applying *uniform* bankruptcy laws, are in disagreement over how much the Constitution protects, or indeed if it even does protect, debtors' freedom to exercise their sincerely held religious beliefs during the life of their bankruptcy payment plan.

Prior Supreme Court holdings have consistently precluded the application of any law in such a way as to require the adherents of a sincerely held religious belief to forgo the lawful practice of their religion as a predicate to receiving a public benefit.

Petitioners' tithe is based on sincerely held religious beliefs. Inclusion of the tithe in Petitioners' disposable income would substantially burden Petitioners' free exercise rights by forcing them to choose between a

public benefit, *viz* bankruptcy, and adherence to their faith.

Granting Petitioners' application for writ of certiorari would give the Supreme Court the opportunity to restore the uniform application of the bankruptcy laws as envisioned by the Constitution and Congress.

Amicus Curiae supports the grant of the writ of certiorari.

INTEREST OF *AMICUS CURIAE*

The National Legal Foundation was constituted for the purpose of advocacy in support of a proper rendering of the First Amendment. It is a non-profit corporation organized to defend, restore and preserve constitutional liberties, family rights and other inalienable freedoms. Typically, this involves The National Legal Foundation on the side of individual plaintiffs, as in the present case, whose First Amendment freedoms are under attack by state authorities. The Court's disposition of this case could dramatically affect the ability of individuals to avail themselves of the bankruptcy laws of the United States

without being burdened in the free exercise of their religious rights.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the court in evaluating this case, especially since The National Legal Foundation was *amicus curiae* in *In re Green*, the only other case decision on this matter.

I. STATEMENT OF THE CASE

The Debtors-Petitioners have filed for the protection afforded by the Bankruptcy Act.[1] The Debtors had the option of filing a petition pursuant to either Chapter 7 (liquidation) or Chapter 13 (reorganization). Because the Debtors wish to repay as much of their debts as is reasonably possible, they have elected to file a petition under the latter Chapter. This decision will have the effect of ultimately paying a greater portion of the Petitioners' debts than would have resulted from filing a petition under Chapter 7.

Prior to his bankruptcy, one of Debtors' financial responsibilities was, and continues to be, the payment of a tithe (10%) of all their income to their church. This is not a discretionary contribution, but one which their sincerely held religious beliefs make mandatory. The Bible admonishes believers to "[b]ring the whole tithe into the storehouse . . . ."[2] The New Testament, in the passage where Jesus rebukes the Pharisees for their hypocrisy,

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[1] 11 U.S.C.S. section 101 *et seq.* (Law. Co-op. 1978).

[2] Malachi 3:10. *See also* Leviticus 27:30; Deuteronomy 14:22.

reaffirms this obligation: "[Y]ou give God a tenth . . . but you neglect justice and the love of God. You should have practiced the latter without leaving the former undone."[3] Debtors have forthrightly disclosed their intent to continue fulfilling this obligation during the life of the payment plan.

The lower courts denied to the Debtors the same basis of access to the public benefits contained in the Bankruptcy Act as debtors who have a different or no religious belief. The lower courts refused to confirm the Debtors' plan because Debtors intended to continue exercising their religious beliefs by tithing. Those courts predicated Debtors' ability to obtain Chapter 13 protection on 1) forgoing their obligation to their church and violating a fundamental precept of their sincerely held religious beliefs by discontinuing their tithe, or 2) extending their payment plan beyond the time period required of debtors with either no religious belief or one that does not require tithing. Payment plans may not extend longer than three years unless the court shows

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[3] Luke 11:42.

cause.[4] The courts' clear holding was that Debtors are not entitled to a three year payment plan if they continue to avail themselves of their right to freely exercise their religious beliefs.

II. DISCUSSION

A. Questions Presented

The impact of the lower courts' rulings extend far beyond a simple denial of one debtor's ability to obtain relief from an overwhelming burden of debt. The lower courts have neglected a bedrock principle of our Nation, the guarantee that no citizen will be subjected to a unique disability on the basis of their religious beliefs. The very first liberty protected by the Bill of Rights is stated thusly: "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[5] In refusing to confirm the Debtors' payment plan, the lower courts refused to consider the First Amendment implications their decision would have. As a result, this case calls in question the continued vitality of the

[4] 11 U.S.C.S. section 1322(c) (Law. Co-op. 1978).

[5] U.S. Const. amend. I.

protection the First Amendment guarantees to every citizen regardless of which religious faith he may profess. Specifically, it raises the question whether a law may validly prohibit the free exercise of religion by requiring the Debtors to relinquish their religious beliefs by classifying their monthly tithe as disposable income. Additionally, the case raises the question whether the courts may deny those who tithe pursuant to a sincerely held religious belief the equal protection of the law by requiring their payment plans to extend further than the three years usually required of non-tithing debtors.

B. Confusion Among Lower Courts

For over ten years the Bankruptcy Courts have been struggling over how 11 U.S.C. section 1325(b)(2)[6] should apply with relation to tithes made pursuant to sincerely held religious beliefs. The silence of the Bankruptcy Act, as well as the Supreme Court, on this

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[6] "'[D]isposable income' means income which is received by the debtor and which is not reasonably necessary to be expended --

(A) for the maintenance or support of the debtor or a dependent of the debtor . . . ."

11 U.S.C.S. section 1325(b)(2) (Law. Co-op. 1978).

question has led to a situation wherein First Amendment protection in the U.S. Bankruptcy Courts is wholly dependent on the fortuitousness of the debtor's residence. The following cases are illustrative of the bankruptcy courts' confusion over how much the Constitution protects, or if it even does protect, the free exercise of religion when federal bankruptcy laws are involved.

1. In the Western District of Louisiana, First Amendment protection is not even considered in the decision to affirm or deny a payment plan. With no explanation, support, or analysis, the court declared that a 10% tithe is excessive.[7] Confirmation of the payment plan was denied, as was the debtors' right to freely exercise their religion.

2. A debtor's religious beliefs are dismissed as "entirely discretionary" in the Eastern Division of the Southern District of Ohio. In *In re Breckenridge*,[8] the court deemed that a 3%

[7] *In re Cadogan*, 4 B.R. 598 (Bkrtcy. W.D. Louisiana 1980).

[8] *In re Breckenridge*, 12 B.R. 159 (Bkrtcy. S.D. Ohio 1980).

contribution to debtor's church would be more "prudent" than the amount required by debtor's religious beliefs.

3. In Indiana, the court reduces religious beliefs to nothing more than "a noble thought and gesture."[9]

4. Even within districts there is confusion as witnessed by the disagreement between the *Breckenridge* court, *supra*, and the Bankruptcy Court sitting in the Western Division of the Southern District of Ohio wherein the court held that "allocations in a debtor's budget for . . . religious and other charitable contributions . . . have often been found by this court to be reasonably necessary . . . ."[10]

5. A tithe to the debtor's church was deemed to be excessive and "not reasonably necessary for

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[9] *In re Sturgeon*, 51 B.R. 82 (Bkrtcy. S.D. Ind. 1985).

[10] *Matter of Davis*, 68 B.R. 205, 216 (Bkrtcy. S.D. Ohio 1986).

Debtor's maintenance or support"[11] in the Delaware Bankruptcy Court. The court made no mention of the debtor's right to freely exercise his religion.

6. Although recognizing that several other courts uphold the validity of tithing as a reasonably necessary expense, the Bankruptcy Court sitting in Florida's Southern District, with no reference to the First Amendment, concluded that, in that district, tithing during the life of the debtor's payment plan would not be permitted.[12,13]

7. In one of the few bankruptcy cases where the First Amendment issues were addressed, the court held that not only would allowing the debtor to continue to tithe over the life of the

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[11] *In re Chrzanowski*, 70 B.R. 447 (Bkrtcy. D. Del. 1987).

[12] *In re Curry*, 77 B.R. 969 (Bkrtcy. S.D. Fla. 1987).

[13] As a result of the judge's holding, Mr. Curry was put to the election of 1) availing himself of Chapter 13 relief and disobeying the precepts of his religion, or 2) remaining faithful to his religious beliefs and forgoing Chapter 13 protection. This election forced Mr. Curry to convert his case to Chapter 7 liquidation. *Id.*

payment plan not be a violation of the Establishment clause, it would be an affirmation of the Free Exercise clause.[14] Therefore, in the Western District of Michigan, the debtors' constitutionally guaranteed rights are protected.

8. Similarly, in the Eastern District of Pennsylvania the Bankruptcy Court concluded that tithing does not violate the creditor's rights under the Establishment clause.[15] The payment plan, including the debtor's tithe, was affirmed.

9. In *In re Bien* the court, after analyzing numerous case precedents, found that the debtor's tithe was a "proper item of proposed budget expense."[16] Therefore, in Connecticut too, First Amendment rights are protected by the Bankruptcy Courts.

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[14] *In re Green*, 73 B.R. 893 (Bkrtcy. W.D. Mich. 1987).

[15] *In re Navarro*, 83 B.R. 348 (Bkrtcy. E.D. Pa. 1988).

[16] *In re Bien*, 95 B.R. 281 (Bkrtcy. D. Conn. 1989).

The United States Constitution gives Congress the authority to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[17] As evidenced by the cases cited *supra*, the lower courts' understanding of the laws with regard to this issue is anything but uniform. This Court, by hearing this case, would have an excellent opportunity to make a uniform statement that the protections afforded by the Bill of Rights are available to all bankrupt citizens of the United States, regardless of their residence.

C. Federal Issue Presented

Virginia as an Example of the Importance of Religious Freedom

The freedom of religion is paramount amongst the freedoms enjoyed by the American people today. In considering the importance of this freedom, this Court has looked to Virginia's struggle for religious freedom as indicative: "[t]his Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such

[17] U.S. Const. art. I , section 8, cl. 4.

leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."[18] In his famous Memorial and Remonstrance Against Religious Assessments, which Madison wrote in response to a tax bill levying assessments to support religious teachers, he asserted:

> we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate .... This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.[19]

This freedom to discharge the duty each owes to their Creator was deemed to be so important it was codified in the *Virginia Statute for Religious Freedom*, the statute to which Justice Black referred in *Everson*,[20] which assailed any governmental interference with a citizen's right to support the church of his choice by stating:

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[18] *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1946).

[19] 8 J. Madison, *The Papers of James Madison* 299 (Rutland & Rachel ed. 1973).

[20] 330 U.S. 1, 12-13 (1946).

> [w]hereas Almighty God hath created the mind free; that *all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness*, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern. . . .
>
> Be it enacted by the General Assembly that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, *or shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief* . . . .[21]

The lower courts impose a civil incapacitation on Debtors by refusing them a public right that would be otherwise available to them if they abandoned their religion. Debtors are being made to "suffer on account of . . . [their] religious opinions or belief" by virtue of the lower courts' rulings that their obedience to the commands of Jesus Christ[22] deprives them of equal access to bankruptcy protection.

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[21] Va. Code section 57-1 (1986) (enacted January 16, 1786).

[22] *See supra* notes 2-3.

It is specifically the Debtors' right to discharge the duty they owe to their Creator which the lower courts seek to direct by force, exactly as Madison feared the government might do. In holding as the lower courts do, they deny the heritage of religious freedom embodied in Virginia's religious freedom statute. Instead of recognizing, as did Justice Douglas in *Zorach v. Clauson*, that "[w]e make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary [and that] [w]e sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish,"[23] the lower courts have, in effect, restricted the beliefs and creeds to which Americans may subscribe and still retain the benefits of the laws of the United States. The Court's historic protection of Americans' sincerely held religious beliefs is needed in this case to prevent erosion of the Bill of Rights' continuing vitality.

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[23] *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Facially Neutral Regulations

The Bankruptcy Act does not, by its terms, restrict the free exercise of religion. However, this Court has previously held that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[24] What is unduly burdensome has been defined to be:

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.[25]

Furthermore, not only may the state not condition receipt of government benefits upon the adherent's performance of an activity repugnant to his religious beliefs, the state may also not condition the receipt of that benefit upon the adherent's disavowal of a legal activity required by his religion.[26]

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[24] *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

[25] *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 717 (1981).

[26] *Employment Div. v. Smith*, 494 U.S. ___, 108 L.Ed.2d 876, 884, 110 S.Ct. ___ (1990).

Here the lower courts asked Debtors to choose between adherence to their faith, by tithing to their church, and receiving an important benefit from the government, viz, the protection of Chapter 13 bankruptcy proceedings. "If the purpose or effect of a law [here a lower court ruling] is to impede the observance of one or all religions . . . , that law is constitutionally invalid even though the burden may be characterized as being only indirect."[27] In considering whether a law could predicate its benefits on the intended beneficiary's disavowal of religiously required conduct, the *Smith* court concluded that "a state could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in *Smith I*, however, the conduct in those cases was not prohibited by law. We held that distinction to be critical."[28] Tithing is not an illegal activity and the law may therefore not require Debtors to forgo the conduct required by their religion.

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[27] *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

[28] 494 U.S. ___, 108 L.Ed.2d 876, 884.

The lower courts' rulings are contrary to the weight and intent of this Court's prior holdings as well as the Constitution's direct prohibition on the abridgement of the right to freely exercise one's religion. Additionally, since we may assume that Congress intends to follow the Constitution's mandates when it passes legislation, the lower courts' rulings frustrate Congress' attempt to pass uniform laws with respect to the subject of bankruptcies.

D. Need for Supreme Court Review

Religious freedom has traditionally been one of the most jealously guarded freedoms held by the American people. The lower courts have denied the Debtors' right to follow the mandates of their sincerely held religious beliefs. The cases cited, *supra*, show that there are few issues that this Court has ever dealt with that are as important as the protection of this First Amendment guarantee.

The lower courts are in confusion over how they should apply a constitutionally guaranteed freedom in the context of bankruptcy proceedings. As noted, a debtor's right to freely exercise his religious beliefs is currently

wholly dependent upon where he happens to live. When the Framers gave Congress the power to pass laws regarding the subject of bankruptcies, they stated that they were to be uniform. The courts, whose duty it is to state what the law is, must express uniform opinions. If they do not, then bankruptcy law is not uniform. The only way to restore this uniformity is for the Supreme Court to hear this case and decide what will be the proper rule of law with regard to this issue.

The lower court rulings are in contravention to many of this Court's holdings with regard to the constitutionality of laws that are applied in such a way as to create a burden on the exercise of a person's religion. This abridgement will continue unchecked if this Court does not take this opportunity to put this situation aright.

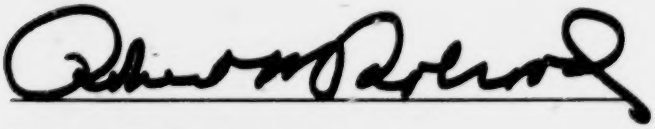
The chances are slim that this Court will have another opportunity to address this issue. Those who are in need of the protection afforded by the bankruptcy laws are rarely in a position to appeal a case as far as the Supreme Court. It is not likely that there will be another

debtor who has the resources to accomplish this task who has also had his rights abridged in this manner.

III. CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully subimitted,



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